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No. 97-7541

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AMANDA MITCHELL,
Petitioner,

v

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Did the district court improperly burden a defendant's Fifth Amendment right not to be compelled to testify by taking a negative inference from the invocation of the Fifth Amendment at sentencing and using that negative inference as a basis for the sentence imposed?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties, Amanda Mitchell and the United States. The remaining twenty-two individuals who were indicted along with Amanda Mitchell as co-defendants have finalized their cases. Some went to trial and were acquitted or convicted. Others pled guilty and took no appeal. No other co-defendant was a co-party on petitioner's appeal to the Third Circuit or in her petition to this Court.

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The Third Circuit's opinion (per Sloviter, C.J., with Roth, J. and Michel, J. concurring) and the Court's accompanying judgment were filed on September 9, 1997. The opinion is published as *United States v. Amanda Mitchell, a/k/a Amanda Foster*, 122 F.3d 185 (3d Cir. 1997). The Petition for Re-argument In Banc was denied on October 17, 1997, with four judges dissenting. JA 129. There is no published opinion of the District Court. The judgment of the Honorable Edward N. Cahn, Chief Judge, Eastern District of Pennsylvania, imposing sentence was dated July 2, 1996. JA 101-111.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 9, 1997. JA 112. The judgment became final by the denial of the Petition for Re-argument In Banc on October 17, 1997. JA 129. The petition for a writ of certiorari was timely filed on January 13, 1998, within ninety (90) days of the final judgment of the Circuit Court. *See* S.Ct. Rule 13.1. Certiorari was granted by this Court on June 15, 1998. This Court's jurisdiction rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "[N]o person . . . shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

A. Procedural History

In August 1994, a federal grand jury sitting in the Eastern District of Pennsylvania returned an indictment against Petitioner, Amanda Mitchell, and twenty-two

other individuals in the Allentown, Pennsylvania area. JA 2-34. Count Two of the indictment charged a single conspiracy against all twenty-three individuals pursuant to 21 U.S.C. Section 846 for conspiring to distribute in excess of five kilograms of cocaine from 1989 to March 1994. JA 3-11. In addition, the indictment charged numerous substantive drug related counts against most of individuals including, as to the Petitioner, three counts of distribution of a controlled substance near a school in violation of 21 U.S.C. Section 860. JA 15, 20, 23.

On October 16, 1995, Petitioner changed her plea from not guilty to the four counts of the indictment with which she had been charged, to guilty of all four counts. JA 35-52. At the change of plea proceeding before the Honorable Edward N. Cahn, Chief Judge of the Eastern District of Pennsylvania, Petitioner admitted her guilt and waived her various constitutional trial rights. During the colloquy, the Petitioner, through counsel, stated that she was not conceding that she had been involved in more than five kilograms of cocaine distribution as had been alleged in the conspiracy count to which she was pleading guilty. JA 38-39. Instead, Petitioner specifically reserved the question of the drug quantity attributable to her for sentencing purposes. JA 39. The Judge ascertained she understood that regardless of the drug quantities attributable to her under the conspiracy count, the Petitioner would be sentenced to a mandatory minimum period of incarceration of at least one year pursuant to 21 U.S.C. 860. Judge Cahn accepted the guilty plea of the Petitioner, while noting that she had specifically reserved for sentencing the quantity of drugs at issue. Judge Cahn made clear that the Petitioner knew and understood that if he found that she was responsible for five kilograms or more of cocaine she would be subject to a mandatory minimum period of incarceration of ten years. JA 40.

In January 1996, several of the remaining defendants proceeded to trial before Judge Cahn. During the course

of that trial, the prosecutor elicited testimony about the overall drug conspiracy and the individuals who participated in it, including the alleged involvement of Petitioner who was not represented at or a party to that trial.

On July 2, 1996, Amanda Mitchell appeared before Judge Cahn for sentencing. The prosecutor presented evidence regarding Amanda Mitchell's involevment in the conspiracy to allow the Judge to make a determination pursuant to *United States v. Collado*, 975 F.2d 985 (3d Cir. 1992) of the drug quantities for which she was responsible. JA 53. The prosecutor presented transcripts from the trial as well as live testimony of three witnesses. JA 53-79.

At the conclusion of the prosecution evidence at sentencing, Judge Cahn inquired of Petitioner what her involvement in the conspiracy had been. JA 93, 97-98. Amanda Mitchell, through counsel, invoked her Fifth Amendment right to remain silent. JA 95. Judge Cahn stated that based upon the evidence presented to him and the negative inference he drew from the Petitioner's invocation of her Fifth Amendment right to remain silent, JA 98, he concluded that she had been responsible for over thirteen kilograms of cocaine, yielding a mandatory minimum sentence of ten years incarceration and a guideline range of 97-121 months. JA 98. Judge Cahn explicitly relied on the negative inference to resolve to doubts that he expressed about the reliability of the accomplice testimony. JA 98-99.

Petitioner appealed the sentence to the United States Court of Appeals for the Third Circuit, contesting both the drug quantity analysis in which Judge Cahn had engaged as well as the propriety of burdening her Fifth Amendment right to remain silent.[1] The Third Circuit,

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[1] The issue of drug quantity analysis for determination of the proper sentence under *Collado, supra*, requires a judge to individualize the drug quantities as to particular defendant as well as examine with caution the testimony and evidence provided by cooperating informants. *Collado, Supra* and *United States v. Miele*, 989 F.2d

after oral argument, issued its opinion on September 9, 1997, affirming the drug quantity analysis and upholding Chief Judge Cahn's determination that the Petitioner had no Fifth Amendment right to decline to be a witness against herself at her own sentencing, and therefore, he could take a negative inference against her for doing so. JA 112-128. On Petition for Reargument to the Third Circuit, Petitioner set forth a comprehensive analysis of the split between the circuits as well as the bases for invoking the Fifth Amendment—protecting oneself from an increased sentence and from the possibility of prosecution for additional offenses. The Third Circuit denied reargument in banc, on October 17, 1997, with four judges dissenting. JA 129. This Court granted certiorari on June 15, 1998.

B. Factual History

Amanda Mitchell appeared before Judge Cahn on October 16, 1995, to enter guilty pleas to all four counts with which she had been charged. During the colloquy Judge Cahn ascertained that she was willing to plead guilty to the conspiracy count, but she did not agree that she was culpable for five kilograms of cocaine. JA 38. Judge Cahn explained that her sentence would be determined largely by the quantity of cocaine for which she was responsible and that would be determined at an evidentiary hearing at sentencing where the government would have to prove her level of drug involvement. JA 40-43.

Judge Cahn also explained to Ms. Mitchell that by pleading guilty she was waiving various trial constitu-

659 (3rd Cir. 1993). Mitchell claimed that there was contradictory evidence regarding the length of time she was involved in this conspiracy—and therefore—the quantities of drugs she was responsible for. The higher estimates were given by cooperating informants whose testimony should have been taken with caution by the sentencing court, but which were not. The defense agreed that Petitioner was responsible for distributing a quantity of cocaine that yielded sentencing guidelines of twenty-one to twenty-seven months.

tional rights, including her Fifth Amendment right to remain silent *at trial.* JA 45.

The sentencing hearing before Judge Cahn required the Government to prove specific drug quantities so that the Court would be able to individualize Amanda Mitchell's sentence pursuant to the dictates of *Collado, supra.* In order to meet this burden of proof, the prosecutor incorporated the trial testimony of four witnesses—Alvitta Mack, Richard Thompson, Shannon Riley, and Paul Belfield. Trial testimony of Alvitta Mack consisted of specific evidence that on three separate occasions Amanda Mitchell delivered quantities of cocaine to her amounting to approximately two ounces. JA 86. These deliveries formed the basis of the only drug quantities for which Petitioner asserted there was reilable evidence upon which to base a sentence. JA 86. Ms. Mack did not testify at sentencing and Ms. Mitchell did not contest the veracity of that trial testimony.

The remaining three individuals testified at sentencing as well as adopted their trial testimony. Shannon Riley's testimony was vague and included no specific drug quantities. JA 75-76. Paul Belfield's testimony mentioned specific drug quantities, but of very small amounts and all occurring through the first half of 1992. JA 78-79. The sole individual who implicated Ms. Mitchell's involvement beyond 1992 was Richard Thompson. His credibility was suspect as he had a prior criminal record, had been involved in significant drug distribution of his own, and was the beneficiary of a cooperation plea agreement. JA 53-71.

Judge Cahn asked Amanda Mitchell if she had anything to say in her behalf regarding her involvement in

[2] At trial Mr. Thompson did not implicate Amanda Mitchell's involvement beyond 1992. At sentencing, he did. In addition, there were other variances between his testimony as well as a general questioning of his credibility in light of his prior convictions and hs own drug dealing activities.

this drug conspiracy. Counsel, on her behalf stated that the only specific drug quantities that had been established pursuant to the dictates of *Collado* were those set forth by Alvitta Mack, amounting to approximately two ounces. The rest of the testimony was not worthy of belief, and was too conjectural for the Court to base a sentence. JA 86-87. The Court rejected this argument and concluded that Petitioner had been involved in distributing approximately thirteen kilograms of cocaine. This was less than the PSI had asserted, but still sufficient to generate a guideline range of 97-121 months and to place Amanda Mitchell in prison for the mandatory minimum period of ten years. JA 99.

When called upon to state her involvement, Ms. Mitchell said:

> "My name is Amanda Mitchell. I know for a long time I used drugs. I did a lot of things I—to get drugs. I'm thankful to be alive today, from getting away from drugs. I changed my whole life totally around, and I just got away from it. I got too involved with doing drugs. And as much drugs as I did, I couldn't have did all the other things. That's all I have to say." JA 98.

Counsel then invoked Ms. Mitchell's Fifth Amendment right to remain silent at sentencing. JA 95, 98. The Court disagreed, stating that she no longer retained such a right. At the conclusion of the sentencing hearing Judge Cahn explained to Petitioner that he had specifically evaluated the testimony regarding drug quantities against her and took into consideration the fact that she refused to testify. JA 98-99. He stated that he did not believe that she had a valid Fifth Amendment right to remain silent and therefore he was taking a negative inference against her interests in evaluating the evidence. Judge Cahn then stated that if he was wrong in this analysis and the appellate court sent the matter back to him, he would re-evaluate the credibility of the informants who testified at the sentencing. JA 98-99.

SUMMARY OF ARGUMENT

The Fifth Amendment commands, "no person . . . shall be compelled in any criminal case to be a witness against himself." Sentencing is clearly part of a criminal case. It has all the fundamental attributes of a criminal case—a critical stage warranting counsel, protections from an increase of punishment under the double jeopardy clause, and due process provisions that are reserved for criminal matters. This Court has recognized that sentencing is part of a "criminal case" warranting Fifth Amendment potections when it precluded the government from using statements that were secured in violation of the Fifth Amendment at a penalty phase hearing. *Estelle v. Smith*, 451 U.S. 454 (1981). *Estelle* is part of the long tradition of granting liberal construction to the Fifth Amendment protections that are designed to protect not just against a prosecution, but against the ultimate reason for a prosecution—the imposition of a penalty and with it, the concomitant restriction of liberty. The history and tradition of the Fifth Amendment reflects that it is a bulwark against the improper removal of liberty. As such, its application at sentencing is pellucid.

This Court has a long tradition of honoring the Fifth Amendment by precluding the improper burdening of that constitutional provision by drawing negative inferences from its invocation. It is clear that such negative inferences cannot be drawn at trial. However, impermissibly burdening the Fifth Amendment right against self-incrimination is not limited to trial matters. On the other hand, the Fifth Amendment can be burdened in a non-punitive setting, such as a civil disciplinary proceeding or psychiatric commitment. Those settings, non-punitive in nature, do not preclude the burdening of the Fifth Amendment by a negative inference. A sentencing following the finding of guilt is an integral part of the criminal proceeding and its purpose is punitive. As such, it is improper for the Court to burden the invocation of the Fifth Amend-

ment right to remain silent by drawing a negative inference against the petitioner for doing so.

In addition to protecting against an increase of sentence, the Fifth Amendment can also be involved at sentencing to protect against subsequent prosecutions. Petitioner was still at risk to be prosecuted for a variety of substantive drug and tax offenses in spite of her plea to conspiracy.

Finally, the plea of guilty does not constitute a waiver of the Fifth Amendment. The colloquy waiving her Fifth Amendment right to remain silent made a specific reference to that right at trial *only*. Further, the Fifth Amendment is waived only by answering questions—not through a generalized waiver at guilty plea.

ARGUMENT

THE SENTENCING COURT IMPERMISSIBLY BURDENED THE DEFENDANT'S RIGHT TO REMAIN SILENT UNDER THE FIFTH AMENDMENT BY TAKING A NEGATIVE INFERENCE WHEN SHE REFUSED TO TESTIFY BY INVOKING THE FIFTH AMENDMENT AS TO HER INVOLVEMENT IN THE DRUG CONSPIRACY TO WHICH SHE HAD PLEADED GUILTY BUT HAD SPECIFICALLY RESERVED THE DETERMINATION OF THE DRUG QUANTITIES ATTRIBUTABLE TO HER FOR A SENTENCING HEARING.

A. The Fifth Amendment Right Against Self Incrimination Protects A Defendant From Being The Instrument Of Her Own Increase In Punishment By Compelling Her To Testify At The Sentencing.

Petitioner, Amanda Mitchell, is a forty-five year old mother and grandmother with no prior criminal record. In August 1994, she was indicted along with twenty-two other individuals in the Allentown, Pennsylvania area for allegedly participating in a drug conspiracy spanning several years. In addition to the conspiracy count, Ms. Mitchell was charged with distributing a controlled substance (cocaine) near a school on three separate occasions, each of which formed the basis for three separate substantive counts under 21 U.S.C. Cec. 860. She pled guilty to all four counts—conspiracy as well as the three substantive counts—in October 1995. JA 51.

After several of the defendants proceeded to trial in January 1996, Ms. Mitchell appeared before Chief Judge Cahn of the United States District Court for the Eastern District of Pennsylvania on July 2, 1996. At an extensive sentencing hearing, consisting of the live testimony of three witnesses and their trial testimony incorporated by reference, plus the trial testimony incorporated by reference of a fourth witness, the sentencing court demanded that the petitioner inform him what the scope of her involvement in the drug distribution had been. JA 83. When she declined to testify and invoked her Fifth Amendment right to remain silent, the Judge responded by stating that she had no such right at this stage in the proceedings. JA 95. Further, in computing the drug quantities,[3] the Judge specifically held the negative inference of the allegedly improper invocation of the Fifth Amendment against her. JA 98. The Judge stated that should the appellate courts determine that she did, in fact, have a right against self-incrimination at this stage of the proceedings, he would reconsider his evaluation of the credibility of the witnesses whose testimony he had used to determine the quantities of drugs, and therefore the basis of her sentence. JA 99.

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[3] "We wish to emphasize that in deciding whether accomplice attribution is appropriate, it is not enough to merely determine that the defendant's criminal activity was substantial. Rather, a searching and individualized inquiry into the circumstances surrounding each defendant's involvement in the conspiracy is critical to insure that defendant's sentence accurately reflects his or her role." *Collado, supra* at 989.

1. *The Plain Language Of The Fifth Amendment As Well As Decisions Of This Court And All Other Circuit Courts Which Have Addressed The Issue Have Concluded That Sentencing Is Part Of A "Criminal Case" Such That The Petitioner Cannot Be Compelled To Be A Witness At Her Own Sentencing.*

The language of the Fifth Amendment is clear. It states, "[n]o person . . . shall be compelled in *any criminal case* to be a witness against himself." (Emphasis added). The scope of the term—"any criminal case"—has been defined by this Court. By reliance upon these unequivocal words in the constitution, this Court has not hesitated to give the privilege against self-incrimination wide application when there is the possibility of criminal sanctons. See *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964). It applies to protect against state and federal prosecutions and investigations. *Malloy v. Hogan*, 378 U.S. 1 (1964). It protects against not only actual incrimination, but also against furnishing a link in a chain of evidence which could be used to bring criminal charges. *Hoffman v. United States*, 341 U.S. 479 (1951).

The legislative history regarding the self-incrimination clause of the Fifth Amendment is virtually nonexistent. Therefore, the best place to determine the meaning and scope of this clause is in the language itself. *United States v. Balsys*, —— U.S. ——, 118 S.Ct. 2218 (1998). This most recent pronouncement by this Court on the scope of the Fifth Amendment is instructive in determining the scope of the language. In *Balsys*, this Court was faced with determining whether the words, "any criminal case", encompassed foreign prosecutions. In concluding that they did not, the opinion of the court recognized that there was little assistance provided by legislative history and instead, in the first instance, examined the words of the Fifth Amendment. The same analysis is used to

determine if sentencing following a conviction is encompassed by the words "criminal case."

To hold that the Fifth Amendment does not apply at sentencing, is to remove sentencing as part of the criminal case. This clearly makes no sense in fact, logic or law. Sentencing is the heart of the criminal case. For the Government, it is the very reason for bringing prosecution against an individual, to inflict punishment for misdeeds against society. For the defendant it is the purpose for which the Constitution has established various protections—so that his liberty—the actual punishment inflicted —cannot be removed without Constitutional protections. Virtually every aspect of criminal law includes sentencing as part of a "criminal case". This Court has termed sentencing a "critical stage" at which a defendant is entitled to the effective assistance of counsel. *Gardner v. Florida*, 430 U.S. 349 (1977). The double jeopardy clause, contextually[4] found in close proximity to the "self-incrimination" clause of the Fifth Amendment protects not only against a second prosecution, but also against increases in punishment. *Weaver v. Graham*, 450 U.S. 24 (1981). There must be compliance with Due Process at sentencing, requiring the prosecution to furnish evidence to the defendant which is exculpatory at trial or which mitigates punishment at sentencing. *Brady v. Maryland*, 373 U.S. 83 (1963). The burden of proof to estab-

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[4] It is significant that the double jeopardy clause and the self-incrimination clause are located together in the Fifth Amendment for determining whether sentencing is included within the concept of a "criminal case". In *Balsys, supra*, this Court found that the contextual relationship between the double jeopardy clause and the self-incrimination clause lent support to the conclusion that neither were meant for protections outside of the United States. Since the double jeopardy clause protects against increase in punishment, it lends support to the idea that the term "criminal case" as to the self-incrimination clause must also include the punishment, or sentencing phase, of a criminal case.

lish particular sentencing based facts falls upon the prosecution. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

All the Circuit Courts except the court below which have addressed the question of whether a criminal defendant retains the right to avoid being a witness against himself at sentencing, and thereby become the instrument of his own increase of punishment, have found the Fifth Amendment right applicable. *United States v. De La Cruz*, 996 F.2d 1307 (1st Cir. 1993); *United States v. Lugg*, 892 F.2d 101 (D.C. Cir. 1989). *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1075-76 (6th Cir. 1990); *United States v. Paris*, 827 F.2d 395, 399 (9th Cir. 1987); *United States v. Hernandez*, 962 F.2d 1152, 1161 (5th Cir. 1992) and *United States v. Kuku*, 129 F.3d 1435 (11th Cir. 1997). The Third Circuit, in this case, has set itself apart from all the other circuit courts, and subjected itself to criitcism for its separate view.[5]

In each of these cases, the various circuit courts of appeal have expressly found that a criminal defendant, ". . . retains a legitimate protectable interest in not testifying as to incriminating matters that could yet have an impact on his sentence." *Lugg, supra* at 103. The First Circuit in *De La Cruz, supra*, found the Fifth Amendment protected the defendant's right not to impair his prospects for being deemed a "minor participant" and secure a lesser sentence. It reaffirmed this holding in *United States v. Montilla-Rivera*, 115 F.3d 1060, 1065 (1st Cir. 1997), and, in doing so, expressly relied upon this court's decision in *Estelle v. Smith*, 451 U.S. 454 (1981). The Eleventh Circuit reached the same conclusion, first in *United States v. Matthews*, 997 F.2d 848, 851, n.4 (11th Cir. 1993) recognizing a defendant's right not to be the instrument of his own increase in punish-

[5] *See*, 111 Harvard Law Review 1143 (February 1998).

ment, and most recently reaffirmed that view in *Kuku, supra*.

The Third Circuit decision in this case not only parts company with all the other circuits, but it does so by misconstruing the holdings of those cases. That court opined that the other circuit decisions only permitted the invocation of the Fifth Amendment to protect against subsequent prosecutions, not to protect against increases in punishment. This is flatly contradicted by the language of these cases which clearly encompass a protection from an increase of punishment.

Finally, the Third Circuit's reliance upon *Reina v. United States*, 364 U.S. 507 (1960) for the proposition that the Fifth Amendment evaporates upon conviction is misplaced. That case involved a defendant who had already been sentenced and was incarcerated as a result of the conviction and sentence and who was additionally granted immunity. Therefore, his testimony could not increase his sentence and the immunity protected him from other prosecutions. *Reina*, simply, has no bearing on this case.

Similar reliance by the Third Circuit on *Ullman v. United States*, 350 U.S. 422, 431 (1956) to the effect that once, ". . . criminality has been taken away, the amendment ceases to apply," was equally misplaced. *Ullman* was also an immunity case which never addressed the question of an increase in sentence. Indeed, if sentencing is deemed to be part of the criminality—and Petitioner contends that it is—then *Ullman* supports her position. It is only once *all* criminality is removed, including sentencing, that a person can be compelled to testify. *Reina* and *Ullmann* contain dicta which misled the Third Circuit into concluding that the Fifth Amendment protections cease at conviction. Neither of these cases stands for this position and neither involve facts from which this conclusion can properly be drawn.

In addition to setting itself apart from the circuits which have addressed this issue, the Third Circuit decision ignores this Court's pronouncement in *Estelle v. Smith, supra,* the case which is most nearly on point. In *Estelle,* this Court considered whether statements made by an incarcerated defendant to a psychiatrist for use at the penalty phase following a conviction for a first degree murder implicated the Fifth Amendment. In concluding that such statements were inadmissible because of the absence of warnings mandated by *Miranda v. Arizona,* 384 U.S. 436 (1966), the Court cautioned that the core of the Fifth Amendment right to protect against self-incrimination

> The availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites . . . we can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. . . . *Any effort by the State to compel respondent to testify against his will at the sentencing clearly would contravene the Fifth Amendment.* (Emphasis added).

451 U.S. at 462-63 (citations omitted). Indeed, at the oral argument in *Estelle,* the State conceded it could not compel the defendant's testimony at sentencing. *Id.*, n.7. The *Estelle* Court recognized that permitting the invasion of the Fifth Amendment right to remain silent at sentencing had dire implications which would undercut the basic adversarial process. Relying upon *Culombe v. Connecticut,* 367 U.S. 568 (1961), the Court stated that the Fifth Amendment not only protected against a defendant being the "deluded instrument of his own conviction", but also "from being made the 'deluded instrument' of his own execution." *Estelle* at 464, citing *Culombe* at 581.

The *Estelle* Court did not hesitate to find that the Fifth Amendment was fully applicable at sentencing. This Court continued the vitality of that decision in *Pennsylvania v. Muniz,* 496 U.S. 582 (1990), *Powell v. Texas,* 492 U.S. 680 (1989) and *Satterwhite v. Texas,* 486 U.S. 249 (1988). While each of these cases, including *Estelle,* involve the death penalty, there is no basis to limit the applicability of the Fifth Amendment protections to cases in which the ultimate penalty of a sentence of death is involved. The decisions which have invoked the "heightened scrutiny" of a death case have never upheld the application of a fundamental constitutional principle at trial or sentencing, while denying its applicability in non-death cases. Indeed, in *Solem v. Helm,* 463 U.S. 277 (1983), this Court rejected the State's contention that the Eighth Amendment bar against cruel and unusual punishment does not involve a proportionality analysis in non-death cases. While acknowledging that cases involving the death penalty differ in kind, not just degree, *Id.* at 289, this Court did not find that this crucial aspect of the Eighth Amendment did not apply to prison sentences.[6] The right to counsel embodied at *Gideon v. Wainwright,* 372 U.S. 335 (1963), a non-capital case itself, has never been limited to capital cases. Similarly, the rights embodied in *Miranda v. Arizona, supra,* have never been limited to capital prosecutions.

There is simply no basis to limit *Estelle* to a capital murder penalty phase. Indeed, this Court in *Estelle* implied as much by stating:

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[6] The only clear line of demarcation as to the application of a fundamental criminal constitutional protection lies at the question of whether there is the deprivation of liberty, not the quantity of liberty at issue. *Argersinger v. Hamlin,* 407 U.S. 25 (1972). *In accord, Nichols v. United States,* 511 U.S. 738 (1994) (use of uncounseled conviction for which no incarceration was imposed is constitutionally permissible to enhance sentence for a new conviction).

> Any effort by the State to compel respondent to testify against his will at the *sentencing* hearing clearly would contravene the Fifth Amendment. *Id.*, at 464. (Emphasis added).

Finally, *Estelle* relied upon *In re Gault*, 387 U.S. 1 (1967), a case which established that the Fifth Amendment applies to a juvenile court adjudication in which punishment by commitment to a state institution may follow. By relying upon *Gault*, the Court in *Estelle* implied that the Fifth Amendment protections apply in the full range of criminal prosecutions to protect against the imposition of the deprivation of liberty—whether that deprivation of liberty is in the form of an ameliorative treatment of a juvenile facility or where the ultimate sanction is the death penalty. For *Gault*, it was the threat of deprivation of liberty that was determinative in the application of the Fifth Amendment to juvenile proceedings. In *Estelle* the same rights were applied in a capital murder hearing. In the case at bar, the Petitioner was subject to ten years incarceration. There has never been a basis to distinguish these situations insofar as the application of the Fifth Amendment is concerned.

This Court's decision in *Estelle* sits squarely within the framework of the Fifth Amendment as defined by this Court precedent. It is not a novel extension of the right to be protected from compelled testimony. Rather, *Estelle* acknowledges that the Fifth Amendment is a fundamental protection embodied in the Bill of Rights of the Constitution. It rests at the core of fundamental guarantees of liberty and therefore it must be liberally construed. *Hoffman v. United States*, 342 U.S. 479, 341 U.S. 479, 486 (1951), citing *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). *Hoffman* made clear that the Fifth Amendment protects not only against compelling testimony regarding the commission of a crime, but also against evidence which may furnish a chain in a link of evidence that could lead to a prosecution. *Id.* at 486-488.

The bar against compelling an individual to provide evidence against himself is a reflection of another fundamental precept of American jurisprudence. Ours is a system that is adversarial in nature, not inquisitorial. Because of this, the privilege is not limited to cases in which confessions are extracted by torture or coercion. Rather, the privilege relates to any compulsion or pressure[7] to provide evidence against oneself. Since "the American system of criminal prosecution is accusatorial, not inquisitorial", *Malloy, supra*, 378 U.S. at 7, it relies firmly upon the Fifth Amendment privilege to remain silent. The incrimination is a counterpart to the burden of proof of the government to produce evidence independent of the accused's mouth, and doing so by employing its vast resources in this endeavor.

In deciding that the Fifth Amendment is fully applicable in state and federal inquiries to protect against prosecutions launched in either jurisdiction, this Court examined the policies of the privilege against self-incrimination.

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its context with the individual to shoulder the entire load," 8 Wigmore evidence (McNaughton rev.,

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[7] *Garner v. United States*, 424 U.S. 648 (1976) (answering questions posed by a governmental entity does not constitute compulsion, but, does provide a basis for invoking the right to remain silent).

1961), 317; our respect for the inviability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States v. Grunewald,* 233 F.3d 556, 581-582 (Frank, J. dissenting), rev'd. 353 U.S. 391; our distrust of self declaratory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent" *Quinn v. United States,* 349 U.S. 155, 162. *Murphy v. Waterfront Commission,* 378 U.S. 52, 55 (1964).

It is the recognition of these policies that have led to the firm foundation and the exaltation of the privilege in our system of law. To that end, it is clear that the reason for the privilege is to protect the individual not only from prosecution for a criminal offense, but, most important, protection from the severest form of punishment—deprivation of liberty. Indeed, in *Murphy* this Court first examined the early English cases before the adoption of the Constitution and found applications of the right to remain silent. In *East India Company v. Campbell,* 1 Ves. Sen. 246, 27 Eng. Rep. 1010, the Court of the Exchequer in 1749 wrote:

> that this Court shall not oblige one to discover that which, if he answers in the affirmative, will subject him to the *punishment of a crime* . . . and that he is *punishable* . . . (emphasis added)

Similarly, in *Brownsword v. Edwards,* 2 Ves. Sen 243, 28 Eng. Rep. 157 the Court stated:

> the general rule is, that no one is bound to answer so as to subject himself to *punishment,* whether that *punishment* arises by the ecleastical law of the land. (emphasis added)

After discussing the English cases and their direct reference to protection against punishment, this Court examined the case of *United States v. Saline Bank of Virginia,* 1 Pet. 100 (1828), in which the Court wrote:

> the rule clearly is, that a party is not bound to make any discovery which would expose him to *penalties* . . . *Murphy* at 378 U.S. 52, 59-60, citing Saline Bank at 104. (emphasis added)

Therefore, the earliest decisions regarding the privilege against self-incrimination adhere to the essence of the protection being against the potentiality of *punishment* or *penalties.* Indeed, the promises of the Fifth Amendment would be empty if they only protected at trial and did not apply at sentencing. It is at sentencing where the *punishment* is imposed.[8]

In the case at bar the petitioner contested the drug quantities in her case. It is the drug quantities and the role she allegedly played in the drug conspiracy that drives the actual sentence imposed. Her admission as to the scope of her involvement, the quantities she delivered and the facts and circumstances of her participation could be a link in a chain of evidence that might produce an increase in her punishment. In addition to establishing drug quantities, the role in the offense could also affect her sentence. As manager, she receives a point increase that leads directly to a higher offense level under the sentencing guidelines and, of course, a higher sentence. U.S.S.G. Sec. 3B 1.1. Therefore, statements regarding what she did and with whom could be used to drive her sentence upwards. The Fifth Amendment protects petitioner from being the "deluded instrument" of her own increase in punishment.

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[8] As noted earlier, the application of the Fifth Amendment in juvenile procedings rested upon precisely the same rationale. *See, Gault, supra.*

2. *The Sentencing Court Improperly Burdened The Right To Remain Silent By Drawing A Negative Inference From Petitioner's Invocation Of The Fifth* Amendment In That Sentencing Is A Criminal Proceeding *In Which Right Is Impermissible.*

The demand by the judge that petitioner tell him what she did, under oath, was not an informal sentencing proceeding where the judge was seeking wide ranging information upon which to exercise discretion. Rather, Judge Cahn's demands came at the conclusion of an extensive evidentiary hearing regarding the scope of petitioner's alleged involvement in the conspiracy. Witnesses were called to testify in which their credibility as cooperators, informants and drug addicts was placed on display for the judge to evaluate.[9] The proceeding before Judge Cahn was a mini-trial/sentencing hearing/penalty phase replete with the fundamentals of criminal hearing fact finding—representation by counsel, confrontation and cross-examination of witnesses, and Due Process considerations. The hearing only lacked the Fifth Amendment right to remain silent.

In *Griffin v. California,* 380 U.S. 609 (1965) this Court held that the Fifth Amendment's bar on compelling testimony was applicable to state prosecutions through the Fourteenth Amendment. In reaching that conclusion, this Court found that commenting on silence of defendant is a negative inference against the right to invoke the Fifth Amendment and thereby impermissibly burdens and penalizes the exercise of that constitutional provision. Commenting on the refusal to testify ". . . is a remnant of the 'inquisitorial system of criminal justice,'" *Murphy v. Waterfront Commission,* 378 U.S. 52, 55 (1964),

[9] Under Third Circuit law the judge is required to give drug estimates rendered by an informant addicts special scrutiny. *United States v. Miele,* 989 F.2d 659 (3rd Cir. 1993) and the government must furnish reliable evidence of an individual's level of drug involvement. *United States v. Reyes,* 930 F.2d 310 (3rd Cir. 1991).

which the Fifth Amendment outlaws. *Griffin, supra,* 380 U.S. at 614. Imposing such a burden or penalty on the exercise of the right against self-incrimination transgresses the Constitution.

In *Carter v. Kentucky,* 450 U.S. 288 (1981), the Court extended *Griffin* to include the right to have the jury expressly instructed that no adverse inference can be taken from the defendant's decision not to testify. *In accord, James v. Kentucky,* 466 U.S. 341 (1984). The *Carter* decision extended to the States on Constitutional grounds the policy that was already in place under Federal statutory law of granting such a jury instruction upon request. *Bruno v. United States,* 308 U.S. 287. *Carter* recognized that the Fifth Amendment right in this regard is a basic constitutional privilege directed to the heart of the American system of justice. *Id.,* at 299-300. As such, these fundamental constitutional guarantees are not decided by whether the prosecution occurs in state or federal court, or whether it involves the death penalty (*Griffin*) or a term of years for lesser criminal offenses (*Carter* and *James, supra*). Regardless of the jurisdiction or the kind of offense, the deprivation of liberty is palpable and requires that the constitutional right not be impermissibly burdened by a negative inference at sentencing.[10]

This Court has not hesitated to strike laws and practices which impermissibly burden the Fifth Amendment right to remain silent by placing a penalty on its invoca-

[10] Nor can *Griffin* and its progeny be distinguished on the basis that these decisions involve protecting a lay jury which might misunderstand the reason for invocation of the Fifth Amendment. This Court, in *Baxter v. Palmigiano,* 425 U.S. 303 (1976), held that a prison disciplinary proceeding can draw a negative inference from the prisoner's refusal to testify without impermissibly burdening the Fifth Amendment. Significantly the Court found several reasons to permit such an inference, but, did not do so on the basis that no jury was involved which might misunderstand the constitutional right to remain silent.

tion. In *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), the State was barred from removing a political party officer from that position on the basis of his refusal to waive the privilege against self-incrimination. Similarly in *Lefkowitz v. Turley*, 414 U.S. 70 (1973) the State was barred from refusing to issue a public contract on the basis of the contractor's refusal to waive the Fifth Amendment privilege. *See also Gardner v. Broderick*, 392 U.S. 273 (1968) (Policeman who refused to waive his Fifth Amendment privilege may not be dismissed from office because of that refusal) and *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280 (1968) (City workers were unconstitutionally discharged where that discharge was based upon the invocation of the Fifth Amendment right to remain silent). Each of the foregoing cases involve the loss of significant economic rights by the simple invocation of the Fifth Amendment. No loss of liberty was at stake. Rather, in each of these cases it was the right of these individuals to pursue various economic activities. Of course, the reason for invocation of the Fifth Amendment was the potential for subsequent criminal prosecution. Nonetheless, this Court determined that such economic interests placed an improper burden on the prospect of self-incrimination.

In *Baxter v. Palmigiano, supra* this Court declined to extend the *Lefkowitz-Garrity* decisions to include a bar upon a prison disciplinary board taking an adverse interest against an inmate's invocation of the right to remain silent. The decision in *Baxter* rested upon the Court's determination that a prison disciplinary hearing is a mere civil proceeding. Negative inferences against the Fifth Amendment are permitted in civil proceedings. *Baxter supra* at 318.

> Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime. We decline to extend the *Griffin* rule to this context. *Id.* 319.

Baxter, supra, commenced a line of cases in which this Court found the Fifth Amendment protections do not apply because of the *civil* nature of the proceedings. The civil penalty trial in *United States v. Ward*, 448 U.S. 242, 248 (1980) was not sufficiently punitive to warrant the Fifth Amendment protections which are reserved for "any criminal case". *See also, Allen v. Illinois*, 478 U.S. 364 (1986) (commitment under a "sexually dangerous predator statute" is civil treatment in nature and non-punitive Therefore, no Fifth Amendment right to remain silent). *Ohio Adult Parole Authority v. Woodard*, 523 U.S. ——, 118 S.Ct. 1244 (1998) (negative inference may be taken at clemency hearing because such proceedings are not "integral part of the system for adjudicating guilt or innocence of the defendant").

These cases make clear that once a matter is deemed civil, or in the case of *Woodard, supra*, so far removed from the criminal process (*Woodard*, involved clemency by the *Executive*, not even a judicial function), it is not improper to "burden" the Fifth Amendment. However, sentencing is a crucial aspect of the criminal process. It is not a civil hearing, and unlike *Ward, supra*, sentencing *is* meant to be punitive. Where this Court has placed the line demarking the application of the Fifth Amendment at whether the hearing is punitive, there is no question that sentencing falls to the side of that line where the Fifth Amendment protections cannot be impermissibly burdened.

The question of whether the exercise of a constitutional provision is impermissibly burdened is best determined by evaluating the legitimacy of the challenged government practice. *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 n.20 (1973). For instance, while there is a general bar under the Fifth Amendment against burdening the defendant's right to remain silent, once that individual testifies his credibility is open to question as any witness. Therefore, his pre-arrest silence can be used against him because the

government has a legitimate interest in using the customary trial tactics as weapons. *Jenkins v. Anderson*, 447 U.S. 231 (1980). Similarly, in *Baxter, supra*, the government has a legitimate interest in an efficient prison disciplinary process.

There is no such legitimate interest at a contested sentencing proceeding. Therefore the invocation of the Fifth Amendment protects the defendant from being the mechanism of his own increase of sentence. It is an integral part of the criminal judicial adjudication process. *Woodard, supra.*

While it is true that the sentencing court has a legitimate interest in gathering as much information as it can about the defendant in order to properly exercise sentencing discretion, it cannot do so in an unconstitutional fashion. Certainly aspects of the sentencing process are more relaxed so as to facilitate the gathering of this information. *Williams v. New York*, 337 U.S. 241 (1949) (Confrontation Clause is not offended by the use of a written pre-sentence report). A judge may consider a defendant's truthfulness while testifying on his own behalf, and, if he unilaterally concludes that the defendant committed perjury while testifying, use that as a basis to increase the sentence. *United States v. Grayson*, 438 U.S. 41 (1978). Indeed, the sentencing court can even consider offenses for which a person has been acquitted in fashioning a sentence. *United States v. Watts and Putra*, 529 U.S. ——, 136 L.Ed.2d 554 (1997), per curiam. In *Nichols v. United States*, 511 U.S. 728 (1994) (use of a misdemeanor conviction which did not result in a sentence of imprisonment can be considered at sentencing) and *Witte v. United States*, 515 U.S. 38 (1995) (use of relevant conduct pursuant to U.S.S.G. 1B1.3 did not violate the double jeopardy clause), this Court has once again reiterated the broad scope of information the courts may consider at sentencing. However, this principle does not address the central question at issue in this

case—whether the invocation of the Fifth Amendment right to remain silent falls within the 'broad inquiry' the Court may consider at sentencing.

This Court has been loathe to permit constitutional violations which go to the very heart of the criminal process. Uncounseled felony convictions cannot be used to enhance sentences. *United States v. Tucker*, 404 U.S. 443 (1972). *See also Townsend v. Burke*, 334 U.S. 736 (1948) (submission of improper information violates due process at sentencing).

Nor does *Roberts v. United States*, 445 U.S. 752 (1980), represent a "legitimate" government interest so as to permit the Fifth Amendment to be burdened. In *Roberts* this court upheld a sentence based, in part, on the defendant's refusal to cooperate with the law enforcement authorities. *Roberts* stands for the unremarkable proposition that a defendant, like any citizen, must report criminal actvity about which he is aware. In reaching this conclusion, the Court stated that, "unless his silence is protected by the privilege against self-incrimination, . . .", *Id.*, at 558, a defendant must speak when required to do so at sentencing. Therefore this Court recognized that the Fifth Amendment right to remain silent is not an appropriate factor for a Court to consider when fashioning a sentence. It is a constitutionally protected area which cannot be burdened at trial or sentencing.

In addition, silence does not reflect upon the character or history of a defendant, like a prior conviction or other criminal activities. It is merely remaining silent to facts within the defendant's knowledge so that the defendant does not become a witness against himself. Silence is ambiguous.[11]

Given the ambiguity of silence, and its constitutionally protected status under the Fifth Amendment, it is im-

[11] Silence lacks significant probative value to permit reference to it at trial. *United States v. Hale*, 422 U.S. 171 (1975).

proper to permit a negative inference to the invocation of the Fifth Amendment. It impermissibly burdens that constitutional right.

B. The Petitioner Had The Right To Invoke The Fifth Amendment And Remain Silent At Sentencing Because She Was Still Subject To Further Prosecution By State And Federal Authorities.

The Fifth Amendment protects an individual from the real threat of prosecution in either Federal or State Court *Malloy v. Hogan, supra*, and *Murphy v. Waterfront Commission, supra*. As noted before, it not only protects an individual from being a witness against himself with exposure to actual incrimination, as well as protecting one from furnishing a "chain in a link of evidence" which may be used to fashion a prosecution against him. *Hoffman, supra*. The Fifth Amendment is as broad as the harm it seeks to protect. This Court has determined that it protects a person from being a witness against himself in any prosecution in this country, leaving an individual subject only to the possibility of incriminating himself in a foreign prosecution. *Balsys, supra*. It can be invoked during a criminal prosecution or investigation, *Griffin, supra*; a federal grand jury, *Hoffman*; state investigation which may implicate Federal laws, *Murphy v. Waterfront Commission, supra*; a civil deposition, *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983); or even, during a sentencing hearing, *Roberts, supra* 445 U.S. at 558. The Fifth Amendment clearly protects an individual from being prosecuted on the basis of a statement made in another setting.

Amanda Mitchell pled guilty to a broad conspiracy pursuant to 21 U.S.C. § 846. Count II of the indictment, a conspiracy count, charged that the petitioner and twenty-two other individuals over a period of approximately five years in two counties, and elsewhere, combined to distribute in excess of five kilograms of cocaine. In nine and one-half pages of a conspiracy count the government al-

leged details of specific roles that particular individuals took as well as broad language that was inclusive of a wide range of activities.[12] JA 3-11. This broad language subjected the petitioner to the possibility of further prosecution on substantive counts by state or federal authorities.

It is clear that having pled guilty to the drug conspiracy, she could not be prosecuted for that offense again without violating the Double Jeopardy Clause. She could also not be charged with a conspiracy under Pennsylvania law as the Pennsylvania Constitution prohibits subsequent prosecution where jeopardy has attached in federal court. *Commonwealth v. Campana*, 452 Pa. 233, 304 A.2d 432 (1973); 18 Pa. Cons. Stat. Sec. 110. However, nothing in federal jurisprudence nor in Pennsylvania law prohibits either jurisdiction from prosecuting Amanda Mitchell for substantive charges based upon her testimony at sentencing if she were to admit to delivery of controlled substances on any other occasion than the three substantive counts to which she pled guilty. There is no double jeopardy bar to successive prosecutions for a conspiracy followed by substantive offense, and testimony for such actions could lead to such a prosecution. *United States v. Felix*, 503 U.S. 378 (1992); *United States v. Dixon*, 509 U.S. 688 (1993).

In addition to the fear of prosecution for substantive drug delivery offenses, compelling Amanda Mitchell to testify could lead to a "link in a chain" of evidence to prosecute her for a violation of RICO, 18 U.S.C. Sec. 1962(c); money laundering pursuant to 18 U.S.C. Secs.

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[12] Paragraph 3 of the "manner and means" if Count II of the indictment reads, "it was further part of the conspiracy that the defendants and others known and unknown to the Grand Jury would and did distribute quantities of cocaine to customers". Paragraph 4 of the "manner and means" of Count II reads, "it was further part of the conspiracy that the defendants would and did act in different roles and would and did perform different tasks at different times.

1956-57; violations of the Travel Act under 18 U.S.C. Sec. 1952; and using a telephone to facilitate a controlled substance transaction in violation of 21 U.S.C. Sec. 843. Further, compelling Amanda Mitchell regarding her activities with drug distribution—and the money she may have secured as the result of this activity—could subject her to tax evasion charges under 26 U.S.C. Sec. 7201 and/or making a false statement upon a tax return in violation of 26 U.S.C. Sec. 7206, and similar charges under state law.

The possibility of incrimination on other charges satisfies the Fifth Amendment standard that the risk of testimony and incrimination must be "real and appreciable". *Marchetti v. United States*, 390 U.S. 39, 48 (1968). If the government wants her testimony at sentencing it had, within its arsenal of weapons, the right to immunize her to remove the fear of prosecution. That the government may be unlikely to pursue a particular defendant once he has been sentenced to a substantial prison term does not remove the real and appreciable fear of further prosecution. The guarantees of the Fifth Amendment protect the individual; the individual need not rely on the good graces of the government's "promise" not to seek further prosecution.

C. Petitioner Does Not Waive Her Fifth Amendment Right To Remain Silent By Entering A Guilty Plea In Which She Specifically Reserved Her Right To Contest Any Drug Quantities At Sentencing, Especially Where The Judge In Conducting The Guilty Plea Colloquy Made Clear To Her That The Burden Of Proof At The Sentencing In Establishing The Drug Quantities Would Be On The Government And Where He Specifically Stated That Waiving Her Right Against Self-Incrimination Was Limited To That Right At Trial.

The relinquishment of a constitutional right can only be accomplished by a knowing and intelligent waiver of that right. *Johnson v. Zerbst*, 304 U.S. 458 (1938). It is

for this reason that federal courts must conduct extensive colloquies concerning the waiving of fundamental constitutional rights before a guilty plea can be accepted. *See* F.R.Cr.P. 11. There are two reasons why the entry of a guilty plea and the purported waiver of the Fifth Amendment right against self-incrimination did not constitute a waiver of that right at sentencing (1) factually there was no such blanket waiver, and (2) if there had been, a criminal defendant still retains a right to decline to questions which may incriminate her.

The colloquy of the guilty plea mandated by Rule 11 and the dictates of *Johnson v. Zerbst, supra* are to insure that fundamental rights are not waived without knowledge of their consequences. To this end Chief Judge Cahn explained to Petitioner the role and function of a sentencing hearing where drug quantities, and, therefore, her likely sentence, are at issue. Judge Cahn stated in dialogue with counsel the following:

> . . . and another important factor is that you're charged in Count II with conspiring to distribute more than five kilograms of cocaine, and that makes the penalties more severe.
>
> Mr. Morley: Judge, we don't agree as to the quantity in this case.
>
> The Court: I understand that you're going to contest her involvement in more than five kilograms.
>
> Mr. Morley: That's correct, sir.
>
> The Court: And that's going to be determined at sentencing.
>
> Mr. Morley: Exactly, sir. And—
>
> The Court: You're going to have a hearing on that.
>
> Mr. Morley: Right. I've explained that to Ms. Mitchell.
>
> The Court: Okay. But she should understand that if she loses that issue, penalties would be much more severe.

Mr. Morley: Yeah, I've explained that to her.

The Court: Okay. Now, it's very-the range of punishment here if very complex because we don't know how much cocaine the government's going to be able to show you were involved in. Listen closely while we go over the range of penalties, and Ms. Miller will do that for us.

The Court: Okay. Now, the penalties you just set forth, Ms. Miller, assume there's a 5 kilogram involvement?

Ms. Miller: That's correct, sir.

The Court: So those are the penalties if the government can prove that you were involved in five kilograms of cocaine distribution. Your lawyer says you're not, is that right?

Mr. Morley. That's correct, sir.

The Court: So if you are not, then the penalties would be less. What do you think the quantity is going to come out to be?

Mr. Morley: Judge, we would—we believe the penalty—the quantities are specified in as specified in the three substantive courts, which is about 85—I believe its between 50 and 100 grams of —.

The Court: And what would the penalty be in that case?

Mr. Morley: The penalty in that case I believe a maximum of ten years. And the—I've discussed—at length with Ms. Mitchell is the sentencing guideline ranges well.

The Court: And what would that be?

Mr. Morley: The guideline range in that is 15 to 21 months not including various adjustments for—

The Court: Acceptance—

Mr. Morley: Acceptance of responsibility, level of participation. I have explained to her that there are fudge factors of points going up and down. I've showed her the graphs and how that might work. JA ——

The Court and counsel continued to evaluate the sentence and explain to Ms. Mitchell that she would be subject to a mandatory minimum of one year for her plea of guilty to 21 U.S.C. Sec. 860, distribution of drugs near a school. Judge Cahn carefully explained to Ms. Mitchell that regardless of the sentencing guidelines and whatever deviations she might be able to persuade him she was entitled to, she was facing a minimum of one year in prison for the violation of sec. 860. JA 41-42.

The colloquy established two fundamental factors at petitioner's guilty plea. First, she was clearly and unequivocably informed that there would be a hearing at sentencing to determine largely determine her sentence—from a mandatory minimum of ten years to a mandatory minimum of 1 year. She was also informed that should her position prevail, her likely sentence would be between fifteen and twenty-one months' incarceration. However, if the government prevailed she was facing a minimum of ten years incarceration. Second, the colloquy established that the burden of proving the quantity of drugs rests upon the government. On two occasions during this colloquy, Judge Cahn made clear that the government has the burden of proof—". . . we don't know how much cocaine the government's going to be able to show you were involved in." JA 39. Later, Judge Cahn stated that those are the penalties if the Government, "can prove that you were involved in five kilograms of cocaine distribution." JA 40.

In surrendering her right to her trial, Amanda Mitchell believed that she would have a full sentencing hearing where she could contest the quantities of drugs attributable to her, and therefore, what her sentence would be. In that hearing, the burden of proof was going to fall squarely upon the government.[13]

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[13] As noted before, the Fifth Amendment is inextricably linked to the burden of proof resting upon the government. *Malloy v. Hogan, supra,* 378 U.S. at 8.

Even more telling than the role of the government at sentencing and what Ms. Mitchell was informed of when she was waiving her right to trial, is the specific character of the Fifth Amendment she was waiving. In conducting the colloquy regarding the surrendering of constitutional rights Judge Cahn stated

> You have the right *at trial* to remain silent under the Fifth Amendment, or at your option, you can take the stand and tell the jury your side of this controversy . . . If you plead guilty, all of those rights are gone. (emphasis added) JA 45.

Therefore, on these facts, Judge Cahn did not accept a broad based waiver of *all* Fifth Amendment rights. Rather, the waiver of the Fifth Amendment secured in this case is limited to its invocation at trial. By no stretch of the imagination can Petitioner have been waiving her right to remain silent at sentencing when all she understood at the guilty plea colloquy was that the implications of the entry of this plea was that she was waiving her *trial* right to remain silent. This is not a knowing and intelligent waiver of the Fifth Amendment at sentencing. *Johnson v. Zerbst, supra.*

The entry of a guilty plea while reserving certain rights is not unusual in Federal Court and has been used to permit a partial waiver of rights. F.R.Cr.P. 11 provides for the entry of "conditional' guilty pleas. This procedure permits a defendant to waive all his constitutional rights, including appellate rights, except for the right to appeal a particular pre-trial motion. Even before such conditional guilty pleas were made part of the Federal Rules of Criminal Procedure, the Third Circuit adopted this procedure. *United States v. Zudick*, 523 F.2d 848 (3rd Cir. 1975). Not all circuits agreed with the propriety of a conditional guilty plea. *United States v. Drummond*, 488 F.2d 972, (5th Cir. 1974). Nonetheless, the practice has now been sanctioned as proper in the Federal Rules. In essence, an individual may go through an entire

colloquy waiving his constitutional rights to trial and to appeal, entering a guilty plea and subjecting himself to a particular sentence, while still maintaining the right to appeal a pre-trial ruling. The entry of such a plea, does not constitute a knowing and intelligent waiver of all trial and appellate rights because it carefully excepts some from the waiver.

Petitioner entered a conditional guilty plea. She specifically reserved at the guilty plea colloquy the right to contest the evidence against her at sentencing. She anticipated a hearing with the burden of proof upon the government to establish drug quantities, and therefore, her sentence. In the same fashion, that a conditional guilty plea under Rule 11 is not a *waiver* of all rights, so the entry of a guilty plea in the fashion made by Amanda Mitchell is not a *waiver* of her constitutional rights at sentencing. Those rights, of necessity, must include the right to remain silent.

Assuming arguendo that this guilty plea colloquy could, in some fashion, be construed to include a so-called waiver of the Fifth Amendment, it is clear that the right not to be a witness against oneself is not waived by a generalized surrrendering of rights. Rather, it is waived by answering particular questions. It is invoked in response to particular questions and its waiver cannot be had until the witness answers. It is the incriminating *testimony* that triggers the exercise of the Fifth Amendment, not some generalized surrendering of a trial right making certain that an individual understands that by the entry of a guilty plea they may be questioned regarding the incident to which they have pled guilty.

A reading of *Hoffman supra*, makes clear that the privilege is testimonial based. It is not invoked in a generalized sense, but, rather invoked on a question by question basis. It is only by such particularized invocation that there can be a fair determination made of the propriety of its invocation. Similarly, in *Murphy supra*, it

was the refusal to answer particular questions that raised the issue of the Fifth Amendment. *In accord, Malloy supra.* In none of these cases did the individual's appearance at proceedings constitute a waiver of the Fifth Amendment. Rather, it was answering particular questions that implicated the Fifth Amendment.

Perhaps it was best said in *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984), where this Court stated:

> Thus it is that a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the privilege rather than answer if he desires not to incriminate himself. If he asserts the privilege, he "may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him" in a subsequent criminal proceeding. *Maness v. Meyers*, 419 U.S. 449 (1975) (White, J., concurring in result) (*emphasis in original*).

It is the *questions* that trigger the need to invoke the Fifth Amendment. *Minnesota v. Murphy, supra*, involved the question of invocation of the Fifth Amendment by a probationer. The mere acceptance of the terms of probation by that individual do not constitute a waiver of the Fifth Amendment any more than mere understanding that by waiving a right to a trial, and its concomitant Fifth Amendment guarantees, constitutes a waiver to the Fifth Amendment at sentencing. It is the questions and answers that control, not the proceeding which triggers the invocation of the Fifth Amendment. Indeed, in the one case which comes closest to addressing the question of invocation of the Fifth Amendment at sentencing, *Roberts v. United States, supra*, this Court declined to hold that allowing credit for cooperation could constitute a burden upon the invocation of the Fifth Amendment. In doing so, this Court did not state that the mere fact

that the defendant in that case had pled guilty would constitute a waiver of the Fifth Amendment. Rather, the court analyzed the scope of the Fifth Amendment and the implications of cooperation and held that each individual has an obligation to give evidence of a crime if it is aware to that person. Only if the defendant expressly relied on the Fifth Amendment, with a basis for doing so, could a constitutional issue arise. However, the entry of a guilty plea in *Roberts, supra*, did not, and could not, constitute a waiver of the Fifth Amendment.

In the same fashion, Ms. Mitchell's entry of her guilty plea in this case does not waive her right to remain silent at her sentencing. In the first instance it is clear from the text of the transcript that she was merely waiving her right at trial. Furthermore, she did what any person must do who seeks to invoke the protections of the Fifth Amendment—she did so in response to a question.

CONCLUSION

For the reasons argued herein, petitioner respectfully requests that this Court vacate the sentence in this case with directions for the matter to be returned to the District Court for re-sentencing.

Respectfully submitted,

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